Wanjohi v Republic (Criminal Appeal E004 of 2023)
[2024] KEHC 7059 (KLR) (20 May 2024) (Judgment)

Neutral citation: [2024] KEHC 7059 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CRIMINAL APPEAL E004 OF 2023

DKN MAGARE, J

MAY 20, 2024

BETWEEN

GRACE WANGARI WANJOHI .... APPELLANT

AND

REPUBLIC .... RESPONDENT

(Appeal from the decision of the Hon D N Bosobori given on 191.2023)

JUDGMENT

1. This an appeal from the decision of the Hon D N Bosobori given on 191.2023. The appellant was charged with counts of stock theft. The appellant is aged 66. years. She Appealed on both sentence and conviction.

2. The appellant was charged together with 7 counts of Stock theft she stole as follows: -

   a. The Appellant and another before court, were charged with stealing stock contrary to Section 278 of the Penal Code. The Particulars of the charge were that on night of 2nd and 3rd March, 2022, at Gitiri village jointly with others before and not before court stole a she goat valued at Kshs. 7,000/= the property of Margret Wambui Kahonge.The Appellant and another before court stole a bull valued at Ksh 20,000 on 28/26 May 2022 a property of Margaret Wambui Kahonge.

   b. The Appellant and another before court, were charged with stealing stock contrary to Section 278 of the Penal Code. Particulars of the charge were that on night of 25th and 26th May, 2022 at Kaharo village jointly with others before and not before court stole bull valued at Kshs. 20,000/ = the property of Paul Munyaka Waithaka.

   c. The Appellant and another before court, were charged with stealing stock contrary to Section 278 of the Penal Code. The Particulars of the charge were that on night of 31st May and 1st

June, 2022 at Thukuma village jointly with others before and not before court stole a she goat of Toggen -burg breed valued at Kshs. 10,000/= the property of Simon Kiminda Macharia.

d. The Appellant and another before court were charged with stealing stock contrary to Section 278 of the Penal Code. The Particulars of the charge were that on night of 31st May and 1st June, 2022 at Miigwa village jointly with others before and not before court stole a freshian cow valued at Kshs. 35,000/= the properly of Bernard Mwangi Cherehe.

e. The Appellant and another before court were charged with offence of stealing stock contrary to Section 278 of the Penal Code. Particulars of the charge were that on night of 2nd and 3rd March, 2022 at Gitiri village jointly with others before and not before court stole a she goat valued at Kshs. 7,000/=, the property of Cecilia Muthoni Kibuthi.

f. The Appellant and another before court were charged with the offence of stealing stock contrary to Section 278 of the Penal Code. Particulars of the charge were that on night of trth and tzth June zozz at Thimu sub-location jointly n'ith others before and not before court stole a she goat valued at Kshs. 7,000/= the property of Agnes Wambui Ndaruiya.

g. The Appellant and another before court were charged with the offence of stealing stock contrary to Section 278 of the Penal Code. Particulars of the charge were that on night of r4tt' and 15$ June, zozz at Kaharo village jointly with others before and not before court stole a he goat valued at Kshs. 7,000/= the property of James Irungu Warui.

h. The Appellant and another before court stole, charged uith the offence of stealing stock contrary to Section 278 of the Penal Code. Particulars of the charge were that on night of t7t and r8th June, 2022 at Kaharo village jointly with others before and not before court stole a freshian cow (Heifer) valued at Kshs. 80,000/= the property of Julius Karaya Waithaka.

3. And each of the count had an alternative of handling the stolen property contrary to section 322 of the Penal code, where the particulars were that on the material date, the appellant, in the named place otherwise than in the course of stealing, dishonestly received or retained one property named in the charge knowing or having reason s to believe it to be stolen property.

4. The appellant pleaded not guilty on 20.6.2022 on 25.7.2022. The matter thereafter proceeded for hearing with 16 witnesses testifying. On being put to defence, the Appellant gave sworn testimony.

5. The Appellant was convicted on all main counts and sentenced to imprisonment for each of the counts.

6. She preferred an appeal and set out the following grounds: -

a. That , the Learned Trial Magistrate erred in points of law and fact by reaching a conviction whereas the complainants had grave credibility issues.

b. That . the Learned Trial Magistrate erred in matters of both law and fact in reaching conviction and sentence on the main count of stealing whilst the same was not proved.

c. That , the Learned Trial Magistrate erred in both points of law and fact by convicting the appellant while there was no p roper proof on the lagged home where the alleged animals (stock) were recovered to have ben exclusively mine without any possibility that there were other people living there and who could have brought he animals.

d. That , the Learned Trial Magistrate erred in law and facts by convicting on a matter marred with glaring inconsistencies and lies as pertains to the exact location of the alleged scene where

the stock was recovered from whether at Gitiri Village, Kaharo Village or Ruhari Village and which were never reconciled.

e. That , the Learned Trial Magistrate erred in both law and fact by convicting and sentencing the appellant on a matter that was not proved to the required standards of proof.

Submissions

7. The State filed submissions stating that the court's duty was settled in the case of Njoroge v Republic (1987) KLR, 19 others, & Okeno u Republic (1972) E.A, 32 and Kiilu & another us Republic.

8. They stated that the offence of stock theft is defined in section 278 of the penal code as follows: -

> " Stealing stock If the thing stolen is any of the following things, that is to say, a horse, mare, gelding, ass, mule, cannel, ostrich, bull, cow, ox, ram, ewe, whether, goat or pig, or the young thereof the offender is liable to imprisonment for a period not exceeding fourteen years.

9. They submitted that the section must be read with Section 268 which states as follows: -

> " A person who fraudulently and without claim of right takes anything capable of being stolen, or fraudulently converts to the use of any person, other than the general or special owner thereof, any property, is said to steal that thing or property. (z)A person who takes anything capable of being stolen or who converts any property is deemed to do so fraudulently if he does so with any of the following intents, that is to say-
>
> (a) an intent permanently to deprive the general or special owner of the thing of it;
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> (b) an intent to use the thing as a pledge or security;
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> (c) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;
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> (d) an intent to deal with it in such a manner that it cannot be returned in the condition in which it was at the time of the taking or conversion;
>
> (e) in the case of money, an intent to use it at the will of the person who takes or converts it, although he may intend afterwards to repay the amount to the owner; and "special owner" includes any person who has any charge or lien upon the thing in question, or any right arising from or dependent upon holding possession of the thing in question.
>
> (3) When a thing stolen is converted, it is immaterial whether it is taken for the purpose of conversion, or whether it is at the time of the conversion in the possession of the person who converts it; and it is also immaterial that the person who converts the thing in question is the holder of a power of attorney for the disposition of it, or is otherwise authorized to dispose of it.

(4) When a thing converted has been lost by the owner and found by the person who converts it, the conversion is not deemed to be fraudulent if at the time of the conversion the person taking or converting the thing does not know who is the owner, and believes on reasonable grounds that the owner cannot be discovered.

(5) A person shall not be deemed to take a thing unless he moves the thing or causes it to move

10. The state submitted that the case before court is that all the eight complainants had their stock stolen from them between the 2nd March, 2022 and 17th of June, 2022.It is their testimony that none of them saw who from them. One thing is clear though throughout their testimonies, that they all found their stolen stock at the compound of the appellant's home.

11. They submitted that the offence was proved. They stated that from om the above, the prosecution was able to prove that the appellant was in possession of the recovered stock thus relied on the principle of recent possession.

12. On this they were guided by the case of David Mugo Kimiinge Vs Repiiblic [2015) eKLR, where the court when commenting on the doctrine of recent possession stated that: -

> " It is trite that before a court of law can rely on the doctrine of recent possession as a basis for conviction in criminal case, the possession must be positively proved.

13. In summary the prosecution must have positive proof that:

    a. That the property was found with the suspect:

    b. That the property is positively the property of the complainant:

    c. That the property was stolen from the complainant,

    d. That the property was recently stolen from the complainant.

14. It was their case that the Appellant was in possession of all stock in the compound. It was their case that the Appellant has not pointed out any inconsistencies.

15. The Appellant argued the Appeal orally.

Evidence

16. PW1 testified that he used to stay in Nairobi but relocated to his ancestral home. The appellant's home is 100 meters from the witness's home. They share a boundary but are not related. He had not known the appellant for 10 years. On the material day at 11 am he was informed that her mother's goats were not at the shed. The mother is Margaret Wamuyu.

17. The mother is 90 years. The witness went and confirmed that only one goat was available. He reported the matter to the Assistant chief. On 1.6.2022 he went to visit his mother he heard noise downhill. He found that cows had been recovered. He identified the mother's goat. The police offices came and carried their investigations. The cow was in appellant's house. On cross examination the witness stated that the that the goat was for his mother.

18. PW2 Agnes Njoki Wangu Warutu a brother to Pw1 she stated that her mother who is also PW1's mother is 90 years and could not attend court. He identified the appellant. He stated that on 5.6.2022 she fixed breakfast and at 9:00am she went to harvest animal fodder. When she went to the shed she found 1 animal missing. She stated that she could identify the goats. She went and found their goat, which was valued around 7,000. On cross examination he stated that the mother and accused 1 did not know each other and had no grudge.

19. The witness was stood down to supply statement she was recalled on 3.8.22.the appellant cross examined the witness who said she did no see the appellant steal the goats.

20. Pw3 testified. He is Simon Kimuda Macharia. He rears goats, cows and coffee. He did not know the appellant and co -accused. On 3.6.2022 he fed his animals and placed them in the shed at 9:00pm. He had 4 cows 2 goats in separate sheds. He had 4 Freshian female cows. He stated that doors are permanent locked as he was zero grazing.

21. In the morning he went to feed goats while Joseph Nyikandi Kariuki went to the cow shed. The witness noted one goat was missing. He called Nyambura Kuria Joseph Nyokabi Gitonga who is his widowed sister in law. He went to Nyeri. He was informed on 18.6.2022 that the animals had been found. He went Assistant chief alerted him that suspected stolen animals had been recovered. He later heard 4-5 gunshot. He reached the place where animals were, which was 6 Km from home. He found 2 cows had been removed from a cow shed.

22. He found Pw1 had identified the goats and confirmed the goat. The witness identified his goat was 10,000. It was being reared for milk. Other people also identified their goats. On cross examination he stated that they complainant stopped away photographs with their goat. One goat had been stolen after giving birth and left a goat born with milk. On cross examination he stated he went to see the thief.

23. Pw4 Agnes Wangu, who is a primary school teacher testified knowing accused 2 and appellant. She was his classmate in lower primary in 1990s. She stated that on 12.6.2022 at 8 .00 am she went to feed animals and found them missing. She initiated a search. She noted the goats were stolen and not cut.

24. Investigations were carried out she recovered her goats from the appellant home. The witness had bought the goat at 3000 from a neighbor in January,2022. On cross examination she stated that the goats was at the appellant home.

25. Pw5 testified that Pw4 is a village mate. she knew the appellant and co- accused. He stated that he sold a goat at 3,000 to Pw4. He identified it. He stated he had not grudge.

26. Other witnesses testified in respect of these cases. They were similar evidence. their evidence was that they knew the Appellant, the homestead belonged to her and that the animals, though stolen from various places, they were recovered in her homestead.

Analysis

27. The duty of the first Appellate court remains as set out in the Court of Appeal for Eastern Africa in Pandya -vs- Republic [1957] EA 336 is as follows: -

> " On a first appeal from a conviction by a Judge or magistrate sitting without a jury the appellant is entitled to have the appellate court's own consideration and views of the evidence as a whole and its own decision thereon. It has the duty to rehear the case and reconsider the witnesses before the Judge or magistrate with such other material as it may have decided to admit. The appellate court must then make up its own mind not disregarding the judgment appealed from but carefully weighing and considering it. When the question arises which witness is to be believed rather than another and that question turns on manner and demeanor, the appellate court must be guided by the impression made on the Judge or magistrate who saw the witness but there may be other circumstances, quite apart from manner and demeanor which may show whether a statement is credible or not which may warrant a court differing from the Judge or magistrate even on a question of fact turning on the credibility of witnesses whom the appellate court has not seen."

28. In the case of Okeno v Republic [1972] EA 32 at 36 the East Africa Court of Appeal stated on the duty of the Court on a first appeal:

> “ An appellant on a first appeal is entitled to expect the evidence as a whole to be submitted to a fresh and exhaustive examination (Pandya v. R., [1957] E. A. 336) and to the appellate court's own decision on the evidence. The first appellate court must itself weigh conflicting evidence and draw its own conclusions. (Shantilal M. Ruwala v. R., [1957] E.A. 570). It is not the function of a first appellate court merely to scrutinize the evidence to see if there was some evidence to support the lower court's findings and conclusions; it must make its own findings and draw its own conclusions. Only then can it decide whether the magistrate's findings should be supported. In doing so, it should make allowance for the fact that the trial court has had the advantage of hearing and seeing the witnesses, see Peters v. Sunday Post, [1958] E. A. 424.”

29. The issue in this case is whether the prosecution proved is case to the required standards. Most oft quoted English decision of by Viscount Sankey L.C in the case of H.L. (E) Woolmington vs. DPP [1935] A.C 462 pp 481, comes in handy in describing the legal burden of proof in criminal matters, that;

> “ Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner’s guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given either by the prosecution or the prisoner, as to whether [the offence was committed by him], the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained.’’

30. In the case of R vs. Lifchus {1997}3 SCR 320, the Supreme court of Canada explained the standard of proof as doth: -

> “ The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the crown has on evidence put before you satisfied you beyond a reasonable doubt that the accused is guilty...the term beyond a reasonable doubt has been used for a very long time and is a part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning. A reasonable doubt is not imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. Even if you believe the accused is guilty or likely guilty, that is not sufficient. In those circumstances you must give the benefit of the doubt to the accused and acquit because the crown has failed to satisfy you of the guilty of the accused beyond a reasonable doubt. On the other hand you must remember that it is virtually impossible to prove anything to an absolute certainty and the crown is not required to do so. Such a standard of proof is impossibly high. In short if, based upon the evidence before the court, you are sure that the accused committed the offence you should convict since this demonstrates that you are satisfied of his guilty beyond reasonable doubt.”

31. According to Halsbury's Laws of England, 4th Edition, Volume 17, paras 13 and 14:

> " The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case of with separate issues."

32. The standard of proof required in such cases was addressed by Brennan, J in the United States Supreme Court decision in Re Winship 397 US 358 {1970}, at pages 361-64 stated that: -

> " The accused during a criminal prosecution has at stake interests of immense importance, both because of the possibility that he may lose his liberty upon conviction and because of the certainty that he would be stigmatized by the conviction...Moreover use of the reasonable doubt standard is indispensable to command the respect and confidence of the community. It is critical that the moral force of criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."

33. The evidence that came to the fore was that 8 animals were stolen in a span of 4 months. All the animals including those caught the previous day were found in the possession of the Appellant. The animals are huge and as such do not move quickly. A span of 2 days to 4 months can be seen as recent.

34. The Court of Appeal set out the elements of the doctrine of recent possession in the case of Eric Otieno Arum v Republic KSM CA Criminal Appeal No. 85 of 2005 [2006] eKLR, as follows:

> " In our view, before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first; that the property was found with the suspect; secondly, that the property is positively the property of the complainant; thirdly, that the property was stolen from the complainant, and lastly; that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one person to the other."

35. The burden of explaining the recent possession is on the Appellant. The stare had duty to proof the occurrence of the offence. In is burden is evidential only and does not relieve the prosecution from proving its case to the required standard.

36. That explanation need only be a plausible. This was set out in the case of Malingi v Republic [1988] KLR 225. In Paul Mwita Robi v Republic KSM Criminal Appeal No. 200 of 2008, where the Court of Appeal observed that;

> Once an accused person is found in possession of a recently stolen property, facts of how he came into possession of the recently stolen property is (sic) especially within the knowledge of the accused and pursuant to the provisions of section 111 of the *Evidence Act* Chapter 80, the accused has to discharge that burden.

37. In the case of, William Oongo Arunda (Hitherto referred to as *Patrick Oduor Ochieng) v Republic (Criminal Appeal 49 of 2020*) [2022] KECA 23 (KLR) (21 January 2022) (Judgment), the court of Appeal stated as follows regarding the doctire: -

> “ We start with the question whether the doctrine of recent possession was properly invoked. As regards the circumstances under which the doctrine of recent possession may apply, in Athuman Salim Athuman vs. Republic [2016] eKLR, thisCourt held that:
>
> > “ The essence of the doctrine is that when an accused person is found in possession of recently stolen property and is unable to offer any reasonable explanation how he came to be in possession of that property, a presumption of fact arises that he is either the thief or receiver. (See Malingi V. Republic (1989) KLR 225 H.C and Hassan V. RepubliC (2005) 2 KLR 151). The circumstances under which the doctrine will apply were considered in Isaac Ng'ang'a Kahiga Alias Peter Ng'ang'a Kahiga V. Republic, CR. APP. NO. 272 of 2005, where this Court stated: “It is trite that before a court of law can rely on the doctrine of recent possession as a basis of conviction in a criminal case, the possession must be positively proved. In other words, there must be positive proof, first that the property was found with the suspect, secondly, that the property is positively the property of the complainant; thirdly that the property was stolen from the complainant and lastly, that the property was recently stolen from the complainant. The proof as to time, as has been stated over and over again, will depend on the easiness with which the stolen property can move from one to the other.”

38. The possession itself must be sufficient. It cannot be that the good must be physically in the hands. Even having control over the same is adequate. The supreme court of the Supreme Court of Uganda in Bogere Moses & Another vs. Uganda, Cr. App. No. 1 of 1997 that:

> “ It ought to be realized that where evidence of recent possession of stolen property is proved beyond reasonable doubt, it raises a very strong presumption of participation in the stealing, so that if there is no innocent explanation of the possession, the evidence is even stronger and more dependable than eye witness evidence of identification in a nocturnal event. This is especially so because invariably the former is independently verifiable, while the latter solely depends on the credibility of the eye witness.

39. On the other hand, circumstantial evidence also place the Appellant as the thief. The goats and cows were safely tacked away. The same were found in the control of the Appellant. There was no explanation for the shift of places for goas and cows. This was a classic case for circumstantial evidence. For circumstantial evidence to work, it must be inconsistent with the accused's innocence. In the case of Ahamad Abolfathi Mohammed and Another v Republic [2018] eKLR, Court had this to say on circumstantial evidence:

> “ However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence. Way back in 1928 Lord Heward, CJ stated as follows on circumstantial evidence in R v Taylor, Weaver and Donovan [1928] Cr. App. R 21: -'It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best

evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial."

40. I do not find any fault in the decision from the court below. Accordingly, Appeal on conviction is dismissed.

41. On sentence, the appellant laments that the same is harsh. However, a test of a harsh sentence has been determined as follows by the court of appeal in Shadrack Kipchoge Kogo vs Republic, Eldoret Criminal Appeal No 253 of 2003 where it was observed as follows: -

> " Sentencing is essentially an exercise of the trial court and for the court to interfere, it must be shown that in passing sentence, the court took into account an irrelevant factor or that a wrong principle was applied or short of these the sentence was so harsh and excessive that an error in principle must be inferred."

42. I must be recalled that though the offences were carried out in 6 different days, they were not in one week. This was through meticulous planning that led to theft spanning 4-5 years. The kind of theft is carried out is not just pre-mediated but habitual. It is not a situation where one fall into occasion temptation.

43. The Appellant had a false impression that due to her age, the court will have mercy on her. It was obvious when she was submitting that that she was shielding someone. Nevertheless, wages of sin are death. The court found that the sentence for each count was between 2-3 years. The minimum sentence provided for stock theft is 7 years.

44. The sentencing guidelines provide as follows: -

> " 4.5.1 In determining the appropriate sentence, courts must assess a number of issues starting with the degree of both culpability and harm.
>
> 4.5.2 The assessment of culpability will be based on evidence of the crime provided through testimony where a trial has been conducted, or, where a plea is entered, through the prosecution summary of facts. Aggravating and mitigating features surrounding the offence may be advanced by the prosecution and the accused person (or his/her representative).
>
> 4.5.3 Where an offence is committed by more than one offender a court shall ascertain the culpability of each of the offenders involved and render individual sentences commensurate to their involvement in the offence.
>
> 4.5.4 The assessment of harm may be based on testimony, or the summary of facts presented and also by a victim impact statement where that has been obtained.
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> 4.5.5 Mitigating factors refers to any fact or circumstance that lessens the severity or culpability of a criminal act and can also include the personal circumstances of the offender.
>
> 4.5.6 Convicted offenders should be expressly provided with the opportunity to present submissions in mitigation.

4.5.7 A list of aggravating and mitigating circumstances – which is not exhaustive – is contained within the GATS along with those specific to murder, manslaughter, and wildlife cases, in Part V.

4.5.8 Having heard all relevant submissions and considered any reports advanced by either prosecution or defence, or the probation or children's officer (where applicable), and any victim impact statement, the court should:

i. Decide as to whether a custodial or a non-custodial sentence should be imposed in line with these guidelines.

ii. In the case of sexual offences, before the terms of a custodial sentence are determined, the court must have recourse to relevant probation reports as required in sections 39 (2) and (4) of the *Sexual Offences Act* No.3 of 2006 that contain provisions about post-penal supervision of dangerous sexual offenders."

45. The court was thus lenient in not finding her sentencing her to a sentence of 7 years, all totaling to 56 years. I therefore find that the sentence was lenient. The next question is whether the same should run concurrently or consecutively. For the issue of consecutive and concurrent, the same is provided for under section 14 of the criminal procedure code as follows: -

"(1) Subject to subsection (3), when a person is convicted at one trial of two or more distinct offences, the court may sentence him, for those offences, to the several punishments prescribed therefor which the court is competent to impose; and those punishments when consisting of imprisonment shall commence the one after the expiration of the other in the order the court may direct, unless the court directs that the punishments shall run concurrently.

(2) In the case of consecutive sentences, it shall not be necessary for the court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to impose on conviction of a single offence, to send the offender for trial before a higher court.

(3) Except in cases to which section 7(1) applies, nothing in this section shall authorize a subordinate court to pass, on any person at one trial, consecutive sentences-

(a) of imprisonment which amount in the aggregate to more than fourteen years, or twice the amount of imprisonment which the court, in the exercise of its ordinary jurisdiction, is competent to impose, whichever is the less; or

(b) of fines which amount in the aggregate to more than twice the amount which the court is so competent to impose.

(4) For the purposes of appeal, the aggregate of consecutive sentences imposed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence."

45. For this sentence to run concurrently the offence must be part of the same transaction. If the same complainant or set of complainants are involved, then for sentence to be applied, then the offences must be: -

a. Different in their nature.

b. Different timelines.

c. Different complainants.

46. The sentencing guidelines provide as follows: -

> " A concurrent sentence will normally be appropriate where the offences arise out of the same incident or facts. E.g., poaching of several animals that vary in the degree of protection they are afforded under the law; a burglary 'spree' of several properties committed in one night; fraud and associated forgeries, or a dangerous driving incident where multiple victims are injured as a result of one offence of dangerous driving e.g., driving into a bus stop.
>
> 2.3.25 A consecutive sentence will normally be appropriate where the offences arise out of unrelated facts or incidents e.g., attempting to obstruct the course of justice in relation to an unrelated offence; where the defendant is convicted of dealing in drugs and also possession of a firearm upon arrest – the firearm offence is not an intrinsic part of the drugs matter and requires separate recognition, or where the accused commits a theft on one occasion and an assault on a different victim on another occasion.
>
> 2.3.26 A consecutive sentence may also be appropriate where the offences are of the same or similar kind but where the court is of the view that a concurrent sentence will not sufficiently reflect the overall criminality e.g., assault of a police officer whilst trying to evade arrest for the original offence; assault of the same victim committed in the context of domestic violence or where there are sexual offences against the same victim."

47. In this case the offence occurred in different dates different locations and with 8 different complainants. Then these was both for small stock and cows. The nature of theft, will mean that a concurrent sentence will be a slap on the wrist. The overall sentence if less than 14 years which is double the sentence allowable for the offence.

48. Sentences also run consecutively for imprisonment in lieu of fines. In the guidelines indicate as follows: -

> " 2. 3.28 In the case of imprisonment in default of payment of a fine, the sentence cannot run concurrently with a previous sentence.51

49. The sentence must as such run consecutively. The upshot of this I find no merit in the appeal. I dismiss the appeal for both sentence and conviction. The appellant should serve the sentence as ordered. However, it is not indicated when the sentence should start.

50. Section 333(2) of the criminal procedure code provides as follows: -

> Warrant in case of sentence of imprisonment

> A warrant under the hand of the judge or magistrate by whom a person is sentenced to imprisonment, ordering that the sentence shall be carried out in any prison within Kenya, shall be issued by the sentencing judge or magistrate, and shall be full authority to the officer in charge of the prison and to all other persons for carrying into effect the sentence described in the warrant, not being a sentence of death.
>
> Subject to the provisions of section 38 of the Penal Code (Cap. 63) every sentence shall be deemed to commence from, and to include the whole of the day of, the date on which it was pronounced, except where otherwise provided in this Code.
>
> Provided that where the person sentenced under subsection (1) has, prior to such sentence, been held in custody, the sentence shall take account of the period spent in custody.

51. The sentence shall therefore rum from the date of arrest completion. Consequently, the sentence should run from the date of arrest on 18.6.2022 excluding any period she was on bond. For a voidance of doubt the sentence is meted out shall run consecutively.

DELIVERED, DATED AND SIGNED AT VIRTUALLY ON THIS 20TH DAY OF MAY 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Miss Lubanga for the State

Appellant present

PC Ms Njeru translating from English to Kikuyu

Court Assistant- Brian